



# Liability Issues in Health Information Exchange

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# Agenda

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**Medical Liability Overview**

**Voyage of the JH Hooper**

**Old Wine in New Bottles**

**Privacy and Security**

**Observations and Questions**



# Medical Liability Overview

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**Medical liability is part of the law of torts, not the law of contract**

**Courts are not highly receptive to attempts to modify or limit the relationship via contract**



# Elements of liability

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**Duty Between Parties (Doctor Patient Relationship)**

**Breach of the Standard of Care (Failure to exercise the care that would be exercised by the average practitioner of the same specialty in the same situation)**

**Injury Proximately Caused by Breach of Duty**

**Determination of Damages**



## **Some Issues**

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**Non-traditional encounters and relationships**

**Definition of Appropriate Standard of Care  
(Specialty, Resources, etc.)**

**Key Role of Expert Testimony (especially to  
establish standard of care and causation)**

**Damages and Limitations of Damages**



## **Other Causes of Action**

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**Informed Consent**

**Breach of Privacy**

**Failure to Protect Information  
Security (coming to a court near  
you)**



## Doctor-Patient Relationship

The Practice of Medicine: the following conduct, the purpose or reasonably foreseeable effect of which is to encourage the reliance of another person upon an individual's knowledge or skill in the maintenance of human health by the prevention, alleviation, or cure of disease and involving or reasonably thought to involve an assumption of responsibility for the other person's physical or mental well being:



# Practice of Medicine

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. . . diagnosis, treatment, use of instruments or other devices, or the prescription or administration of drugs for the relief of diseases or adverse physical or mental conditions.





## Practice of Medicine

A person who holds himself out to the public as a "physician" or "surgeon," or with the initials "M.D." or "D.O." in connection with his name, and who also assumes responsibility for another person's physical or mental well being, is engaged in the practice of medicine.



# Standard of of Care

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**Prevailing Practice Sets Standard of Care**

**But rarely, Courts will raise the bar**

**The TJ Hooper**



## The TJ Hooper

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**Indeed in most cases reasonable prudence is in fact common prudence, but strictly it is never its measure. A whole calling may have unduly lagged in the adoption of new and available devices.... Courts must in the end say what is required. There are precautions so imperative that even their universal disregard will not excuse their omission**



## Helling v. Carey

**. . . a greater duty of care could be imposed on the defendants than was established by their profession. The duty could be imposed when a disease, such as glaucoma, can be detected by a simple, well-known harmless test whose results are definitive and the disease can be successfully arrested by early detection, but where the effects of the disease are irreversible if undetected over a substantial period of time**



# Old Wine, New Bottles

## **St. Germain v. Pfeifer – (1994)**

- A nurse's failure to communicate orders to other members of care team could lead to liability
- A physician's failure to clearly communicate orders to "staff under his control" can lead to liability
- A resident's failure to read a chart can lead to liability



# Privacy Liability

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**HIPAA, state law and other federal laws create clear duties to protect the privacy of medical information and to secure it**

**The lack of a private right of action under HIPAA does not preclude state law liability under state statutes, state common law, or through professional discipline.**



# HIE and Privacy

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**Providers, Payers and others operating HIE systems will face liability for misuse of protected health information or for failing to use reasonable and appropriate safeguards to secure it**

**HISPC project will collect state laws and business practices that HIE must accommodate**



# Privacy Balance

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**The advantages of HIE will be available only if the public trusts the system to protect privacy and security**

**Special challenges in protecting the privacy and security of mental health, genetic and other forms of sensitive health information.**





# Observations

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**Courts will apply facts and circumstances tests to find a doctor-patient relationship leading to a duty of care**

**Prevailing professional practice will set the duty of care -- in most cases**



## Observations

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**Failure to use actually available technology to avoid harm likely to lead to liability**

**Failure to go to the “cutting edge” of technology unlikely to lead to liability, except in highly unusual cases –see Helling v. Carey**



# Observations

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**Physicians already have a duty to clearly communicate with others on the care team**

**Physicians already have a duty to read records, test results and orders**

**Health IT can help**



# Food for Thought

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**When will checking medication history via e-prescribing technology become part of the standard of care?**

**When will sending a Continuity of Care Record become part of the standard of care?**

**What is the greater risk—the advent of new technology, or the failure to use it?**



# Questions?

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